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IN THE

# Supreme Court of the United States

Term, 1944. No. 763.

UNITED STATES OF AMERICA, Ex Rel., THEODORE  
ROOSEVELT POTTS,

*Petitioner,*

*v.*

ROBERT W. RABB, United States Marshal for the Middle  
District of Pennsylvania,

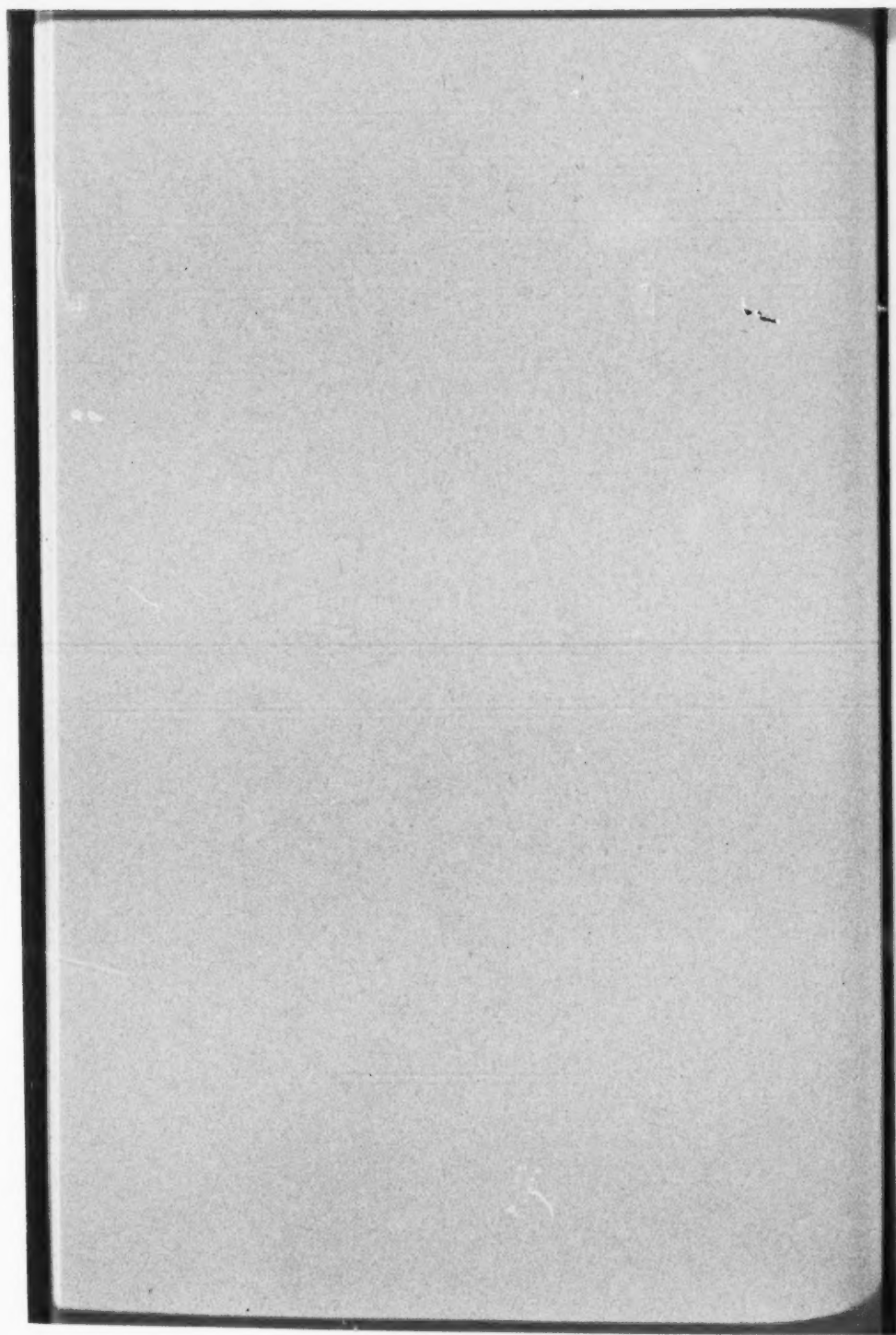
*Respondent.*

Petition for Writ of Certiorari to the United States Circuit  
Court of Appeals for the Third Circuit.

WALTER BIDDLE SAUL,

*Counsel for Petitioner.*

SAUL, EWING, REMICK & HARRISON,  
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Philadelphia, Penna.,



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**Supreme Court of the United States.**

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UNITED STATES OF AMERICA, Ex REL. THEODORE  
ROOSEVELT POTTS,

*Petitioner,*

*v.*

ROBERT W. RABB, UNITED STATES MARSHAL FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT.**

*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

The petitioner prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit, entered in the above entitled case on February 14, 1944, and in accordance with the rules of your Honorable Court, sets forth and avers as follows:

**A Summary Statement of the Matter Involved.**

The petitioner Potts filed in the District Court for the Middle District of Pennsylvania, a petition for a writ of habeas corpus, alleging that he had been arrested upon a warrant that had been issued, without probable cause, and praying for the protection of the provisions of the Fourth Amendment of the Constitution of the United States. The petitioner Potts had been arrested on a bench warrant that had been issued by the Judge of the District Court, following the indictment, commonly known as "The United States

Attorneys' Bill," there having been no arrest or preliminary hearing before the United States Commissioner, the indictment having been found in the first instance by the grand jury. The District Court refused to grant the writ and was sustained in its refusal on appeal, by the Circuit Court.

### **Opinions of the Court Below.**

1. Opinion by Judge Watson in the District Court for the Middle District of Pennsylvania.

2. Opinion by Judge Biggs in the Circuit Court for the Third Circuit.

Copies of the opinions are attached to this petition.

### **Jurisdiction.**

The jurisdiction is founded on Article 3, Sec. 2, of the Constitution, the question involved being the construction of the Fourth Amendment of the Constitution and a citizen's rights thereunder.

Section 240 of the Judicial Code;  
28 U. S. Code Annotated, Sec. 347.

### **The Questions Presented.**

1. Does a citizen of the United States, under the Fourth Amendment of the Constitution, have the right to demand that reasonable cause be shown for his arrest before he can be taken into custody under a warrant?

2. Is a writ of habeas corpus the proper writ to be issued to protect the citizen's rights under the Fourth Amendment?

### **The Reasons Relied On for the Allowance of a Writ.**

The petitioner stands solely and entirely on the protection guaranteed him under the Fourth Amendment of the Constitution. His position is that outside the question of martial law, there is no power under the Constitution that

can subject him to arrest, unless and until reasonable cause be shown for the issuance of a warrant.<sup>1</sup>

In the overwhelming majority of cases the question presented in this petition does not arise, because the ordinary procedure in the institution of a criminal action is the filing of an affidavit and an immediate hearing before a United States Commissioner, or if it be a state proceeding,<sup>2</sup> before the committing magistrate. The question of reasonable cause, in the ordinary case, is therefore determined at the inception of the proceeding by the United States Commissioner or the committing magistrate.

In comparatively recent times a practice has developed under which no preliminary hearing is held. The United States Attorney goes directly before the grand jury and requests an indictment. The indictment is presented in court and a bench warrant is issued by the judge for the arrest of the person accused. The proceedings before the grand jury being secret, there is nothing in the record open to the inspection of the accused, to determine whether or not probable cause existed, either for the indictment in the first instance or for the warrant based on the indictment issued thereon. The petitioner in this case was arrested on a bench warrant issued on such an indictment. The petitioner was never given a hearing and no attempt was made by the government to show probable cause for the petitioner's arrest.<sup>3</sup>

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<sup>1</sup> The records of the indictment clerk of the United States Attorney's office in Philadelphia shows that only between 1 and 2 per cent of the indictments found in the Eastern District of Pennsylvania are United States Attorney bills.

<sup>2</sup> The practice in the Commonwealth of Pennsylvania is to require the District Attorney to show reasonable cause to the court and secure court approval before he can request a bill of indictment on his own motion.

<sup>3</sup> In the opinion of Judge Watson in the District Court, reference is made to a hearing in open court. The hearing referred to was a hearing on the petitioner's right to a writ of habeas corpus and was strictly limited to the question of the issuance of the writ.

As far as the petitioner is concerned, the Fourth Amendment to the Constitution of the United States is meaningless if he can be arrested and forced to stand trial on an indictment found in secret. It requires no stretch of the imagination to envisage what harm could be done by an unscrupulous or prejudiced attorney, clothed with all the power of the United States, as far as the grand jury is concerned in requesting indictments, whether the evidence justifies an indictment or not, or indeed whether there was any evidence of any kind, or just a mere request of the United States attorney that an indictment be found.

If the petitioner is entitled to the protection of the Fourth Amendment, it is submitted that his only protection is by a petition for a writ of habeas corpus. If he waits for trial to raise the question, he has suffered all the expense and humiliation of being made a defendant in a criminal court. If he is so situated that he cannot give the required bail, he must languish in jail until trial. In either event he has lost the very protection afforded by the plain language of the Fourth Amendment, which provides that he shall not be arrested on a warrant without probable cause.

The opinion of the Circuit Court suggested that the petitioner's rights under the Fourth Amendment would be protected by a motion to quash the indictment. Unfortunately, the suggestion is inadequate, for two reasons—First, the petitioner on the motion to quash would be met by the bar of secrecy surrounding the proceedings of the grand jury, and, second, the remedy would be utterly inadequate because if the motion to quash were refused, there would be no right of appeal, because such an action would be interlocutory and not final.

Your petitioner therefore claims that a fundamental right guaranteed to him by the Fourth Amendment to the Constitution, has been denied him.

#### **Position of the Court Below.**

The Circuit Court of the United States for the Third Circuit, in the opinion filed, dismissed the appeal of your



petitioner as moot, on the ground that after the petitioner had been taken into custody and the court had refused to grant him a writ of habeas corpus, he was within a few hours released on bail. That the defendant was able to give bail was merely for him a fortuitous circumstance.

It would be a curious commentary on the law if a citizen desiring to protect himself against arrest without reasonable cause, should be required to remain in jail until the appellate court could pass on the question of whether or not reasonable cause existed. If that be the law, your petitioner suggests that it would render the language of the Fourth Amendment meaningless.

WHEREFORE it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals be granted.

And your petitioner will ever pray etc.

WALTER BIDDLE SAUL,  
*Counsel for Petitioner.*

SAUL, EWING, REMICK & HARRISON.